

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2017-0403

State of New Hampshire

v.

John T. Brawley

Appeal from Judgment of the Rockingham County Superior Court

**BRIEF FOR THE *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW
HAMPSHIRE, PROFESSOR ALBERT E. SCHERR, AND NEW HAMPSHIRE LEGAL
ASSISTANCE IN SUPPORT OF JOHN T. BRAWLEY**

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QUESTIONS PRESENTED

This Court has solicited amicus curiae briefs from interested persons on the following issues:

- A. Does a defendant's acquittal divest the superior court of jurisdiction to enforce a payment order previously issued to the defendant pursuant to RSA 604-A:9?

[*Amici's* answer: No. As a matter of statutory interpretation, the superior court of criminal jurisdiction is granted the jurisdiction to enforce payment orders to the Office of Cost Containment ("OCC") under RSA 604-A:9, even if the debtor is acquitted. However, regardless of whether the superior court of criminal jurisdiction has the authority to enforce OCC payment orders, the court enforcing such payment orders must comply with (i) the protections of RSA 604-A:2-f, (ii) the right to equal protection under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution, and (iii) the right to be free from excessive bail under Part I, Article 33 of the New Hampshire Constitution and the Eighth Amendment to the United States Constitution. *See* Sections I-III *infra*.]

- B. Do the notice provisions set forth in RSA 604-A:9, I-c apply to a defendant who has been acquitted?

[*Amici's* answer: Yes. As a matter of statutory interpretation, the notice provisions set forth in RSA 604-A:9, I-c concerning the enforcement of OCC payment orders apply to all debtors, even if the debtor is acquitted. However, these notice provisions violate the right to equal protection under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution because such provisions treat OCC debtors differently from other civil judgment debtors. *See* Section III *infra*.]

Consistent with this Court's request that "amicus curiae briefs and memoranda should focus on the ramifications of a decision and not solely upon the interests of the parties filing such briefs," *Amici* seek to address the following important questions that exist regardless of whether the superior court of criminal jurisdiction has jurisdiction to enforce OCC payment orders (including if the debtor is acquitted):

1. Do the 2017 protections enacted by the legislature in RSA 604-A:2-f apply to all OCC debtors? [*Amici's* answer: yes; *see* Section I *infra*.]
2. Does the issuance by the courts of cash bail orders in the amount owed to OCC violate the following constitutional rights:
 - a. The right to equal protection under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States

Constitution given that such orders treat OCC debtors differently from other civil judgment debtors? [*Amici's* answer: yes; *see* Section II.A *infra.*]

- b. The right to be free from excessive bail under Part I, Article 33 of the New Hampshire Constitution and the Eighth Amendment to the United States Constitution given that such orders are not set at an amount that would be necessary to secure the debtor's presence in court? [*Amici's* answer: yes; *see* Section II.B *infra.*]
3. Do the notice provisions of RSA 604-A:9, I-c violate the right to equal protection under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution given that they treat OCC debtors differently from other civil judgment debtors? [*Amici's* answer: yes; *see* Section III *infra.*]

IDENTITY OF AMICUS CURIAE

The American Civil Liberties Union of New Hampshire (“ACLU-NH”) is the New Hampshire affiliate of the American Civil Liberties Union (“ACLU”)—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under the New Hampshire and United States Constitutions. Founded nearly 50 years ago, the ACLU-NH has participated in numerous cases before this Court involving the scope and application of constitutional rights. Over the last several years, the ACLU-NH has spearheaded an effort in New Hampshire to draw attention to debtors’ prisons practices—namely, practices where indigent individuals are jailed for not paying financial obligations owed to the State without a meaningful inquiry into their ability to pay and without adequate due process protections. The ACLU-NH’s work in this area included the publication of a report on September 23, 2015 entitled “Debtors’ Prisons in New Hampshire.” *See* ACLU-NH Sept. 23, 2015 Debtors’ Prison Report, Appendix Exhibit (“App. Ex.”) A, at 2-24. Following the publication of this report, the ACLU-

NH sought before the New Hampshire Supreme Court Advisory Committee on Rules the enactment of rules, on a pilot basis, that would help address this issue by, in part, providing court-appointed counsel to those defendants facing jail due to their inability to pay an assessment.¹ On February 25, 2016, the ACLU-NH, Professor Albert E. Scherr, and the Circuit Court’s Chief and Deputy Administrative Judges submitted a joint memorandum to the Rules Committee advocating for these rule changes.² In August 2016, the Rules Committee, by a vote of 8 to 7, recommended that the New Hampshire Supreme Court adopt these rules.³ However, on October 17, 2016, the New Hampshire Supreme Court, in a 4 to 1 decision (Conboy, J., dissenting), accepted many of the rules, but rejected the portion providing a right to court-appointed counsel, holding that this proposal was “a matter properly left to the New Hampshire legislature.” *See In re August 3, 2016 Report of the Advisory Committee on Rules*, No. R-2016-003 (N.H. Oct. 17, 2016), App. Ex. B, at 26-27. In response, the New Hampshire legislature enacted Senate Bill 200.⁴ Senate Bill 200 states, in part, that “No defendant shall be incarcerated after a final hearing for nonpayment of an assessment or nonperformance of community service unless counsel has been appointed for a defendant who is indigent or such defendant has executed a valid waiver of counsel for the final hearing.” *See* RSA 604-A:2-f, I.

Professor Albert E. Scherr is a law professor at University of New Hampshire School of Law. He is the Chair of the International Criminal Law & Justice Program. He teaches in the area of constitutional procedure. He has also been a frequent *pro bono* advocate in the area of the right

¹ These proposed rules changes can be found here: <https://www.aclu-nh.org/sites/default/files/wp-content/uploads/2016/03/ACLU-NH-Court-Proposal.pdf>.

² *See* Feb. 25, 2016 Joint Memorandum in Support of Proposed Rule 2.7 Amendments by the ACLU-NH, Professor Albert E. Scherr, and the Circuit Court’s Chief and Deputy Administrative Judges, available at <https://www.aclu-nh.org/sites/default/files/wp-content/uploads/2016/03/Joint-Memo-Supporting-Rule-2.7-Changes.pdf>.

³ *See* Aug. 3, 2016 N.H. Rules Committee Report, available at <https://www.courts.state.nh.us/committees/adviscommrules/reports/August-3-2016-Report-to-the-Court.pdf>.

⁴ *See* 2017 Senate Bill 200, available at http://www.gencourt.state.nh.us/bill_Status/billText.aspx?sy=2017&id=965&txtFormat=pdf&v=current.

to counsel and the intersection of indigency and the criminal justice system. He has been a cooperating counsel with the ACLU-NH on a number of cases and issues. *See, e.g., New Hampshire v. Brouillette*, 166 N.H. 487 (2014). He was the co-author along with the ACLU-NH of the September 23, 2015 report entitled “Debtors’ Prisons in New Hampshire,” as well as the February 25, 2016 joint memorandum to the New Hampshire Supreme Court Advisory Committee on Rules advocating for rule changes in this area. These efforts led to the substantial court rule and legislative reforms discussed above.

New Hampshire Legal Assistance (“NHLA”) is a non-profit law firm that provides civil legal services to low-income clients to address the legal problems that affect their daily survival and most basic needs. NHLA has a history of providing both individual representation and systemic advocacy to New Hampshire’s poor and disadvantaged residents. Specifically, NHLA has two key roles which inform its work as co-amicus in this case. First, through its Senior Law Project, NHLA advises low income judgment debtors about how to guard their protected income, such as Supplemental Security Income, from collection efforts. NHLA also participates in the Consumer Debt Subcommittee of the New Hampshire Access to Justice Commission. When seniors use protected income for subsistence needs, rather than to pay collectors, they can better pay for their food, housing, and medical needs. Second, through its Youth Law Project, NHLA represents minors who are involved in the juvenile justice system and their parents. Due to the nature of juvenile court and the high recidivism rate, parents of court involved youth often end up with mounting debts to the OCC, in addition to the obligation to reimburse the state for the cost of court ordered services. Despite already precarious financial circumstances, these parents face threats of incarceration when they are unable to meet their payment obligations. OCC debts and collection practices can threaten the family’s elusive quest for financial and overall stability.

STATEMENT OF THE CASE AND THE FACTS

In September of 2015, Defendant John Brawley was charged with two counts of simple assault. The court appointed a public defender to represent Mr. Brawley. In February of 2016, Mr. Brawley was acquitted of both charges. However, pursuant to RSA 604-A:9, Mr. Brawley must repay the OCC \$453.75 for being appointed a public defender. The OCC acts as the State's debt collection agency when it comes to repayment for court-appointed counsel.

On December 30, 2016, the OCC filed a motion to show cause in the criminal court, alleging that Mr. Brawley did not meet his payment obligations. *See State's Br.*, App. 6. In its Motion, the OCC requested a show cause hearing, the issuance of an arrest warrant, and cash bail to be set at \$453.75 (the same amount of the debt) if Mr. Brawley failed to appear. *See id.*

The OCC sent notice of this show cause hearing to the last address Mr. Brawley gave the OCC, after verifying that mail is delivered to that address. However, the OCC did not verify that Mr. Brawley actually receives mail at this address. *See State's Br.*, App. 7. Mr. Brawley failed to appear for the show cause hearing that was scheduled for February 10, 2017. *See State's Br.*, App. 8, 9. On February 18, 2017, given Mr. Brawley's failure to appear, the Superior Court (Schulman, J.) issued an arrest warrant with bail set at \$50. Under the warrant, Mr. Brawley was to be released upon payment of this \$50 amount, which would be remitted to the OCC. *See State's Br.*, App. 9. Mr. Brawley was ultimately arrested pursuant to this warrant, and he paid this \$50 bail amount as a condition of his release on or about March 9, 2017. *See State's Br.*, App. 10. This \$50 was ultimately forfeited to the OCC, thereby reducing his obligation to \$403.75. *See Brawley Case Summary*, App. Ex. C, at 35-37.

Mr. Brawley allegedly failed to make additional payments on this remaining \$403.75 obligation. As a result, a hearing on his failure to pay was scheduled for June 9, 2017. *See State's Br.*, App. 11. Mr. Brawley failed to appear at this hearing. As a result, the OCC requested that an

arrest warrant be issued by the Superior Court. Specifically, the OCC sought to have Mr. Brawley jailed until he paid the full amount of his debt (\$403.75), which would then be forfeited to the OCC. Alternatively, the OCC asked the Superior Court to have Mr. Brawley jailed for three days before a bail hearing was conducted.

On June 15, 2017, the Superior Court (Schulman, J.) denied the OCC's request. The Superior Court concluded that Mr. Brawley's debt to the OCC is a civil debt because Mr. Brawley had been unconditionally discharged from this case when he was acquitted. Therefore, according to the Superior Court, the OCC is a civil judgment creditor, and it must pursue repayment through the avenues reserved for civil judgment creditors. The OCC brought this appeal challenging the Superior Court's rulings.

SUMMARY OF ARGUMENT

The OCC is the State's debt-collection agency tasked with collecting moneys from people who are too poor to pay for their own criminal defense representation. The OCC is, by definition, tasked with collecting money from people whom the courts have deemed indigent.

As a threshold matter, under RSA 604-A:9, the superior court of criminal jurisdiction is granted the jurisdiction to enforce OCC payment orders, even if the debtor is acquitted. However, regardless of whether the superior court of criminal jurisdiction has the authority to enforce OCC payment orders, this brief makes three arguments concerning how OCC debts are collected in New Hampshire. First, courts enforcing such payment orders must comply with the protections of RSA 604-A:2-f. Through Senate Bill 200 enacted in 2017, the New Hampshire legislature commanded that "[n]o defendant shall be incarcerated after a final hearing for nonpayment of *an assessment* ... unless counsel has been appointed for a defendant who is indigent or such defendant has executed a valid waiver of counsel for the final hearing." *See* RSA 604-A:2-f, I (emphasis added). Because an OCC payment order is an "assessment," OCC debtors are entitled to counsel and the other

statutory protections of RSA 604-A:2-f if there is a prospect of being jailed for nonpayment. These protections are not being complied with. *See* Section I, *infra*.

Second, a court cannot, upon the OCC's request, issue a cash bail order in the amount of the debt obligation—and then forfeit any bail amount collected to the OCC—because this practice is unconstitutional. The imposition of such cash bail orders, like the one requested in this case by the OCC, would violate the right to equal protection under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution. This is because these orders treat OCC debtors differently from other civil judgment debtors. Under the rules and laws governing civil judgment debt collection, cash bail orders are not issued in similarly situated circumstances. This Court has already held that the OCC, in order to comply with equal protection principles, cannot arbitrarily deprive its debtors from the protections provided to other civil judgment debtors.⁵ *See also* Section II.A *infra*. These cash bail orders also violate the right to be free from excessive bail under Part I, Article 33 of the New Hampshire Constitution and the Eighth Amendment to the United States Constitution. This is because these bail orders are not set at an amount that would be necessary to secure the debtor's presence in court.⁶ *See also* Section II.B *infra*.

Third and finally, the notice provisions of RSA 604-A:9, I-c violate the right to equal protection under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution. This is because these notice provisions treat OCC

⁵ *See Opinion of the Justices*, 121 N.H. 531, 538 (1981) (rejecting a proposed law that would “deprive indigent criminal defendants of the protective exemptions that RSA 512:21 affords to other civil judgment debtors,” and holding that “such discriminatory treatment runs afoul of equal protection principles”); *see also James v. Strange*, 407 U.S. 128, 134-42 (1972) (deeming a Kansas statute as a violation of equal protection because, in not allowing indigent defendants all of the exemptions provided for other judgment debtors, the state had singled out a class of judgment debtors for discriminatory treatment for no rational reason, and had imposed on them punitive conditions of repayment not imposed on other judgment debtors).

⁶ *See Opinion of the Justices*, 117 N.H. 382, 384 (1977) (“The purpose of the imposition of bail is to assure the defendant's appearance in court, and therefore the amount of bail may be set no higher than that figure reasonably required to accomplish this result.”).

debtors differently from other civil judgment debtors. RSA 604-A:9, I-c authorizes the OCC to simply mail notice to the debtor's last known address on file, as it did in Mr. Brawley's case. However, notice is much stricter under New Hampshire's civil judgment collection process. *See* N.H. Superior Court Rule 51(c); N.H. Circuit Court Rule 1.21(2).

HOW THE OFFICE OF COST CONTAINMENT OPERATES

When a person accused of a crime punishable by incarceration seeks court-appointed defense counsel, the person completes a four-page "Financial Affidavit & Application for Court Appointed Counsel" form. As a condition of receiving court-appointed defense representation to which the person is entitled under the Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment of the United States Constitution, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), the person is required to check a box on the form stating that "I understand that if an attorney is appointed to represent me, I shall be liable for all legal fees and any other court approved costs of my representation and will be ordered to repay the state according to my ability which will be determined by the Office of Cost Containment (OCC). I understand that I must contact OCC within 5 days to confirm my mailing address, verify my ability to repay and make ongoing payment and contact arrangements." *See* Financial Affidavit & Application for Court Appointed Counsel, App. Ex. D, at 40.⁷ Consistent with RSA 604-A:9, II, the person effectively acknowledges that: "I understand that I may be required to repay the services provided me by court appointed counsel unless the court finds that I am or will be financially unable to pay." *Id.* at 39. The form does not state exactly how much a person will owe when accepting court-appointed defense counsel nor does it explicitly notify the individual that the obligation remains even if the individual is acquitted.

⁷ *See also* N.H. Admin. Rules, Adm. 1003.02 (discussing information that a defendant must provide), *available at* http://www.gencourt.state.nh.us/rules/state_agencies/adm1000.html.

A person’s “agreement” with the State to pay OCC fees through this form can hardly be considered an arm’s length exchange. When a defendant completes this form at the inception of the criminal case, the defendant is alone, unrepresented, often jailed, and facing the full weight of New Hampshire’s prosecutorial power. Many of these indigent defendants are unsophisticated and lack understanding of the law. Many will not know what they are signing or understandably think that this “Financial Affidavit & Application for Court Appointed Counsel” form is solely used for determining whether someone is qualified for court-appointed defense representation (and not for subsequent government debt collection practices). And for those indigent defendants sophisticated enough to read and fully understand the entire form and its disclosure that the defendant will owe fees to the OCC, there is a dangerous prospect that some—particularly, those who have had prior experiences with the OCC and received bills for hundreds or thousands of dollars—may simply not invoke their constitutional right to court-appointed counsel and may instead seek to represent themselves *pro se*. In short, every day in the trenches of our criminal justice system indigent persons charged with crimes are forced to make a Hobson’s choice: either invoke your constitutional right to court-appointed defense counsel and agree to pay a yet unspecified amount in attorneys’ fees, or decline court-appointed defense counsel and be at the mercy of the State’s prosecutorial power. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (noting that it would be “intolerable [for] one constitutional right ... to be surrendered in order to assert another”). Put simply, a debtor defendant’s “agreement” to pay the OCC is effectively the product of coercion.

If the person qualifies for court-appointed defense counsel based on his or her financial status, the court endorses and approves the representation by checking off a box on the “Financial Affidavit & Application for Court Appointed Counsel” form stating: “Application Approved: If approved this form and NE/NFL required – send to OCC.” *See* Financial Affidavit & Application

for Court Appointed Counsel, App. Ex. D, at 41. The court then sends the defendant, the OCC, and the New Hampshire Public Defender's Office a "Notification of Eligibility, Appointment of Counsel/Notification of Liability and Repayment Order" like the one sent to Mr. Brawley. *See* State's Br., App. 5. This Notification form is created administratively, with the Court using an electronic signature. This Notification states that counsel has been appointed. It also notes, for the first time, the specific amount that the defendant is obligated to pay to the OCC based on the offenses charged. The form further explains that the defendant may "be liable for other costs of representation and additional legal expenses at the end of your trial or hearing." *Id.* This Notification notes, in part, that the person is "liable to reimburse the state for legal expenses based on the appointment of counsel" and orders the person to contact the OCC "within 5 days of this order to verify your address and make payment arrangements" *Id.* The form ads: "FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN THE ISSUANCE OF A CONTEMPT CITATION, THE DEDUCTION OF WAGES SUBJECT TO THE PROVISIONS OF RSA [512:21]⁸, OR BOTH." *Id.*

The defendant can owe to the OCC no more than "the state's flat rate for a contract attorney as established contractually pursuant to RSA 604-B." *See* RSA 604-A:9, I. These fees, for example, can range, at the trial court level, from \$300 for a Circuit Court misdemeanor to \$2,490 for a felony charge of aggravated felonious sexual assault, felonious sexual assault, or first-degree assault. *See* N.H. Judicial Council Contract Attorney Fee Schedule for Fiscal Year 2018, App. Ex. E, at 44. If a defendant appeals a decision to the New Hampshire Supreme Court, the defendant has to pay another fee to the OCC, which shall be no more than \$2,000. *See* N.H. Supreme Court Rule 47(2)(e). Even if a defendant pleads guilty to an offense that is lower than the charged offense, the level of the charged offense usually dictates the amount that a defendant

⁸ The form references, in a typographical error, RSA 152:12.

owes. Thus, if a prosecutor overcharges a defendant, the defendant's OCC liability is dictated by the charging decision. The State may also "collect from the defendant a service charge of up to 10 percent of the total amount of fees and expenses owed by such defendant." *See* RSA 604-A:9, I. After initially ordered by the court, there is apparently no legal obligation for the OCC to discharge this debt if the person is or becomes too poor to pay it. Rather, if the OCC declines to voluntarily discharge the debt when an indigent debtor claims he has no ability to pay it, then it is incumbent on the indigent debtor—who likely lacks resources and is unsophisticated—to seek relief from this payment obligation. *See* RSA 604-A:9, I-b ("Any defendant subject to an order under this section may petition the court for relief from the obligation imposed by this section, which may be granted only upon a finding that the defendant is unable to comply with the terms of the court's order or any modification of the order by the court."). Indeed, the OCC's rules appear to mandate that a person owes at least \$5 towards this obligation per month, even if the person has the ability to pay nothing.⁹

New Hampshire's OCC repayment statute requires courts to order repayment as a condition of probation or conditional discharge for defendants whose sentence does not include incarceration. *See* RSA 604-A:9, III. This means that defendants can have their probation revoked or can be further jailed if they willfully fail to pay their OCC obligation. In 2001, the New Hampshire Superior Court expressed equal protections concerns with a similar practice that the courts previously employed of ordering OCC repayment in all criminal sentences.¹⁰

⁹ *See* N.H. Admin. Rules, Adm. 1005.01(c)(1) ("A defendant shall meet his or her minimum liability for legal expenses by ... Paying to the office of cost containment an initial payment and monthly installments totaling an amount equal to one half of the sum reached by performing the calculation set forth in (d) below, rounded down to the nearest \$5.00 value."), available at http://www.gencourt.state.nh.us/rules/state_agencies/adm1000.html.

¹⁰ *See State v. Maniscalco*, Nos. 98-S-482-485, 98-S-591-594, 2001 N.H. Super. LEXIS 5, at *4 (N.H. Super. Ct., Rockingham Cty., May 14, 2001) (explaining that standard sentencing forms (i) ordering a defendant to pay OCC fees and (ii) noting that a suspended sentence could be imposed in the event of nonpayment "treat[ed] similarly situated persons differently and, therefore, could present a viable equal protection claim if actual harm were to result") (Coffey, presiding justice), App. Ex. F, at 46-47; *but see Opinion of Justices*, 121 N.H. 531, 538 (1981) ("It is our

The OCC can commence collection efforts at any time, either during or after the pendency of the underlying criminal case. When the OCC uses the criminal courts to seek an unpaid debt, the debtor does not receive court-appointed counsel to defend against the OCC's claim. As part of its debt collection practices, the OCC regularly files a form "Motion to Show Cause" in the criminal court that is hearing or heard the defendant's criminal case.¹¹ The OCC used this form Motion in this case. *See* State's Br., App. 6. The OCC files this form with the court when, in its view, the debtor defendant is not complying with repayment and the OCC has been unable to reach the debtor, including by mail using the debtor's last known mailing address. The form Motion asks the Court to "order the defendant to show cause why he should not be held in contempt for failure to comply with the Court's orders regarding attorney fees, plus all other approved costs of Court appointed representation." *Id.* The form Motion also explains that the court has found, in the "Notification of Eligibility, Appointment of Counsel/Notification of Liability and Repayment Order" entered at the inception of the criminal case, that (i) the defendant is "liable for the costs of court appointed representation and ordered that he contact the [OCC] to determine his ability to repay the State and make payment arrangements" and (ii) the defendant "keep the Court and OCC informed of his mailing address." *Id.* The form Motion then states the defendant's outstanding balance and argues that the debtor "has not complied with the Court's order regarding payment, nor has he shown OCC any cause for noncompliance." *Id.* Most significantly, the form Motion not only asks for a hearing to be scheduled, but also asks the Court to, "[o]n failure to appear at any hearing, issue a Warrant for the Defendant's arrest with Cash Bail set at" the amount owed. *Id.* The Administrator of the OCC, who is neither a party to the criminal

opinion that there is a rational basis for distinguishing between defendants whose sentences include actual incarceration in the State prison and those whose sentences do not.").

¹¹ *See, e.g.*, Aug. 26, 2016 Mot. to Show Cause and Oct. 26, 2016 Mot. for Bench Warrant in *State v. English*, App. Ex. G, at 52-53; Dec. 30, 2016 Mot. to Show Cause and Feb. 22, 2017 Mot. for Bench Warrant in *State v. Cosme*, App. Ex. H, at 65-66; Dec. 30, 2016 Mot. to Show Cause and Feb. 22, 2017 Mot. for Bench Warrant in *State v. Chenette*, App. Ex. I, at 77-78.

case nor a lawyer with the ability to practice law in New Hampshire, signs this Motion to Show Cause.¹²

When the Motion to Show Cause hearing occurs, it is also common for no representative of the OCC to show up at the hearing.¹³ And if the debtor fails to appear, courts frequently enter the orders requested by the OCC, which rule that an arrest warrant shall be issued and that the debtor shall be held on cash bail in the amount owed and, if posted, the cash bail “shall be paid over to the Office of Cost Containment.”¹⁴ The Superior Court’s arrest warrant form has made the issuance of these cash bail orders easy, as this form has a section where a court can issue an arrest warrant and simply check off several boxes indicating that “ The defendant shall be released upon payment of \$ ____, which SHALL MAY be forfeited without a further hearing to: Office of Cost Containment” See N.H. Superior Court Form Arrest Warrant, App. Ex. L, at 134; see also *State’s Br.*, App. 9.

The OCC views itself as an atypical creditor. The OCC treats its indigent debtors differently than how state law treats all other civil judgment debtors. Unlike any other creditor who must attempt to collect a debt by paying a court filing fee and using the civil judgment/periodic payment debt collection process in RSA 524:6-a and Superior Court Rule 51/Circuit Court Rule 1.21 (including their strict notice requirements), the OCC—as it did in this

¹² See RSA 311:1 (“A party in any cause or proceeding may appear, plead, prosecute or defend in his or her proper person, that is, pro se ...”) (emphasis added); RSA 311:7-a (“the attorney general may maintain an action for injunctive relief in the supreme or superior court against any person who renders, offers to render, or holds himself or herself out as rendering any service which constitutes the unauthorized practice of the law”); see also DR 7-105(A) of the ABA Model Code of Professional Responsibility (“A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”).

¹³ See, e.g., *State v. English*, July 19, 2017 Hearing Transcript, App. Ex. G, at 56-58; *State v. Cosme*, Mar. 27, 2017 Hearing Transcript, App. Ex. H, at 69-70; *State v. Anderson*, July 17, 2017 Hearing Transcript, App. Ex. J, at 85-86; *State v. Atwood* OCC Case File, App. Ex. K, at 101-105 (May 19, 2017 Hearing Transcript) and 124-129 (Nov. 27, 2017 Hearing Transcript).

¹⁴ See, e.g., *State v. Atwood* OCC Case File, App. Ex. K, at 119. In some cases where the debtor does not appear at the show cause hearing, the courts specifically note at the hearing that bail is set at “cash to settle” the OCC debt. See *State v. English*, July 19, 2017 Hearing Transcript, App. Ex. G, at 56-57; *State v. Cosme*, Mar. 27, 2017 Hearing Transcript, App. Ex. H, at 69-70; *State v. Anderson*, July 17, 2017 Hearing Transcript, App. Ex. J, at 85-86.

case—uses the coercive power of cash bail orders set at the debt amount to enforce its debt obligation. The OCC does this even though it is not a party to the criminal proceeding. Nor is the OCC an arm of the court (like a clerk’s office which collects fines), as it is an executive branch agency. The OCC often seeks these cash bail orders after the criminal case has concluded, including even if the person was acquitted (as in this case). Put simply, OCC debtors are treated unequally and differently from other civil judgment debtors simply because they are poor and invoked their constitutional right to counsel.

The OCC routinely seeks these cash bail orders in criminal courts throughout New Hampshire. In so doing, the OCC commandeers criminal court resources without paying filing fees or even showing up for the hearing it requested. This commandeering causes the courts to divert significant time away from their criminal justice mission and towards helping the OCC collect debts unrelated to the sentence that are often only in the hundreds of dollars. As in this case, the OCC will often seek these cash bail orders for a failure to appear without verifying that the person currently lives at the address that the notice was sent to. And when the notice sent is marked “return to sender” by the postal service, the OCC will often continue to seek a cash bail order if the debtor fails to appear even though the OCC knows that the debtor was actually never informed of the hearing given the returned notice.¹⁵

Courts frequently sign these cash bail orders requested by the OCC when a debtor fails to appear. Thus, under the terms of the order, when and if the debtor is arrested, the person may be detained until the person posts bail in the exact amount owed to the OCC. As the Superior Court in this case recognized, this bail amount has no relationship to the amount that would be necessary to secure the appearance of the debtor in future court proceedings. If the bail order is enforced, the

¹⁵ See, e.g., *State v. Cosme*, Case Summary, at Index #20 (show cause hearing held and bench warrant issued on March 27, 2017 after mail returned on March 13, 2017), App. Ex. H, at 64; *State v. Chenette*, Case Summary, at Index #11 (hearing held and bench warrant issued on February 22, 2017 after mail returned on February 21, 2017), App. Ex. I, at 76.

person must post this amount regardless of the person's ability to pay the debt. This contradicts RSA 604-A:9, I's command that a court order requiring repayment must be "consistent with the defendant's present or future ability to pay." *See* RSA 604-A:9, I. If posted, the courts then presumably remit this amount to the OCC. If the OCC debtor cannot pay after being detained under this cash bail scheme, that person runs the risk of being jailed indefinitely under the terms of this bail order.

If the cash bail order is enforced, the person must also post this amount in full to obtain release. This money will then be remitted to the OCC regardless of whether the funds used would have been exempt if this was a standard civil judgment debt.¹⁶ With respect to this OCC debt, failure to accommodate the exemptions listed under RSA 512:21 violates New Hampshire statutory and constitutional law. *See* RSA 604-A:9, III (stating that "no money, rights, or credits listed in RSA 512:21 shall be subject to deduction"); *see also Opinion of the Justices*, 121 N.H. 531, 538 (1981) (holding that OCC debtors cannot be deprived "of the protective exemptions that RSA 512:21 affords to other civil judgment debtors"). If the cash bail order is enforced, the person must also post this amount and pay the OCC regardless of whether the person's only income is from social security benefits, which would be exempt from collection if this were a civil judgment debt. *See* RSA 282-A:159 (exempting Social Security benefits); *see also Todd v. Romano*, 131 N.H. 96, 97 (1988) (holding that the protection given social security recipients under 42 U.S.C. § 407(a) unambiguously ruled out any attempt to attach Social Security benefits); N.H.

¹⁶ *See* RSA 524:6-a, II (exempting "[a]ny income from a retirement plan or arrangement qualified for tax exemption purposes ... shall be exempt from periodic payments up to the amount of 50 times the minimum hourly wage as established by the Fair Labor Standards Act, per week"); RSA 512:21 (listing multiple exemptions); RSA 511:2 (exempting certain property from attachment and execution); RSA 480:1 (exempting a debtor's homestead interest in the amount of \$120,000); RSA 282-A:159 (exempting unemployment compensation benefits, provided they are not mingled with other funds, unless debts are for necessities furnished while the debtor was unemployed or for child support); RSA 281-A:52 (exempting workers compensation benefits, except for certain medical bills related to the injury and certain attorneys fees); RSA 167:25 (exempting state welfare benefits); RSA 167:25 (exempting public assistance to the blind, aged, or disabled persons).

Superior Court Rule 51(g) (discussing exemptions in periodic payment context); N.H. Circuit Court Rule 1.21(5) (same).

It also appears that at least one New Hampshire court may be issuing—without an ability-to-pay hearing as constitutionally required under *Bearden v. Georgia*, 461 U.S. 660 (1983)—bench warrants when a person simply fails to make a payment under a court-ordered payment plan. The ACLU-NH has identified this practice in Franklin Circuit Court. It is unclear whether this practice is pervasive in other courts throughout New Hampshire. The cases of Joshua Atwood and Devon Hanson in Franklin Circuit Court are examples of this problematic practice.

In November 2015, Mr. Atwood was charged with stealing a black web Bluetooth transformer at a Walmart in Tilton. *See, e.g., State v. Atwood* OCC Case File, App. Ex. K, at 94. He was specifically charged with willful concealment, a class A misdemeanor. *See* RSA 637:3-A. In April 2016, Mr. Atwood pled guilty and was given to a 90-day jail sentence that was suspended for two years on the condition of good behavior. He was ordered to pay Walmart \$65.54 in restitution, which was presumably the value of the device stolen. *Id.* at 95-96. As a result of the case, Mr. Atwood also owed \$302.50 to the OCC. When Mr. Atwood failed to make OCC payments, the court issued an order on May 1, 2017 stating the following as reflected on the case summary: “Failure to pay as ordered. BW [bench warrant] to Issue – \$252.50 Cash Only Bail.” *Id.* at 91, 100. This order—which does not appear to be the product of a failure to appear—was a clear violation of the principle in *Bearden* that a court can only jail someone for not paying a fine if it can be shown, by means of a hearing, that the person in question could have paid it but “willfully” chose not to do so. Here, the court issued a bench warrant and cash bail order in the debt amount without a hearing, let alone an ability-to-pay assessment. On or about May 19, 2017, Mr. Atwood was arrested pursuant to the arrest warrant. A video arraignment/bail hearing was held because Mr. Atwood was unable to post the \$252.50 bail amount. As a result of the bail

hearing, the Franklin Circuit Court ordered Mr. Atwood on May 19, 2017 to “remain incarcerated until \$100 in cash is posted” with the amount to be paid, when posted, “to OCC.” *Id.* at 101-108. This hearing also violated Mr. Atwood’s constitutional rights. The hearing lasted only minutes with a sparse inquiry into his ability to pay and without the debtor having had the ability to consult with counsel. In short, the court used jail as a mechanism to extract money from an indigent person (in this case, the \$100 was paid by Mr. Atwood’s mother and remitted to the OCC to secure Mr. Atwood’s release). *Id.* A hearing was later held on June 2, 2016 in Mr. Atwood’s case where the court ordered Mr. Atwood to pay \$20 per month starting on June 2, 2017. *Id.* at 109.

The Franklin Circuit Court issued another problematic order on July 11, 2017 when Mr. Atwood failed to make the monthly payment on July 2, 2017. As an apparent result of this nonpayment, the court issued a bench warrant on July 11, 2017 stating “B/W [bench warrant] to issue \$70 cash bail.” *Id.* at 92, 110. This warrant was apparently issued simply because Mr. Atwood failed to make a payment (as opposed to a failure to appear). Again, the court conducted no ability-to-pay hearing before this order was issued. Mr. Atwood was arrested on July 28, 2017 pursuant to this warrant, and \$70 was posted and remitted to the OCC securing his release. *Id.* at 111-116. Once again, jail was used to extract an OCC payment. In Mr. Atwood’s case, he was arrested detained on at least three separate occasions—on May 19, 2017, July 28, 2017, and November 23, 2017—concerning a \$302.50 OCC obligation, at considerable expense to the court, county, and law enforcement resources. *Id.* at 89-93 (Case Summary). One of these detentions spanned 3 days (between November 22-24, 2017) over Thanksgiving 2017. *Id.* at 120-132.

Similarly, in the case of Devon Hanson, the defendant failed to make a weekly \$50 payment, and the Franklin Circuit Court then issued an order on November 11, 2016 stating “Failure to pay – BW [bench warrant] to issue – \$302.50 Cash.” *See, e.g., State v. Hanson Case Summary, App. Ex. M, at 138, 145.*

Through these practices, the OCC is exercising unprecedented power with the assistance of the courts. Not only does the OCC wish to “piggyback” off the criminal case by using the coercive and expedient penalties that the criminal justice system provides, but the OCC also seeks to jump ahead of the line as a creditor, including ahead of victims who are owed restitution and family members who are owed family support obligations. When a person is jailed under this practice and obtains his or release after paying the OCC, the OCC would recoup that money regardless of whether the victim has been provided timely and full restitution and regardless of whether the person has outstanding child support obligations.¹⁷

ARGUMENT

Under RSA 604-A:9, the superior court of criminal jurisdiction is granted the jurisdiction to enforce OCC payment orders, even if the debtor is acquitted. However, regardless of whether the superior court of criminal jurisdiction has the authority to enforce OCC payment orders, this brief makes three arguments concerning how OCC debts are collected in New Hampshire.

I. Courts Enforcing OCC Payment Orders Must Comply with the 2017 Protections Enacted by the Legislature in RSA 604-A:2-f, Regardless of Whether the Debtor is Acquitted.

A. RSA 604-A:2-f Controls the OCC Debt Collection Process in This Case.

The OCC and the courts must enforce the 2017 protections enacted by the legislature in RSA 604-A:2-f. Currently, there is no such compliance.

RSA 604-A:2-f was enacted in Senate Bill 200 and made effective on August 1, 2017, prior to the events that gave rise to this appeal. This bill expanded on the rights and process available to a person under Rule 29(e) of the New Hampshire Rules of Criminal Procedure when the person has failed to pay “an assessment.” Senate Bill 200 states, in part, that “No defendant

¹⁷ See RSA 651:62-67 (authorizing restitution to victims, including allowing garnishment for restitution under RSA 651:64); RSA 21-M:8-h (parameters of the victims’ compensation fund); RSA 21-M:8-k, II(j) (noting that victims of felonies have “the right to restitution, as granted under RSA 651:62-67 or any other applicable state law, or victim’s compensation, under RSA 21-M:8-h or any other applicable state law, for their losses”).

shall be incarcerated after a final hearing for nonpayment of *an assessment* ... unless counsel has been appointed for a defendant who is indigent or such defendant has executed a valid waiver of counsel for the final hearing.” See RSA 604-A:2-f, I.

An OCC obligation is “an assessment” under the plain language of RSA 604-A:2-f, thereby triggering the protections that this statute provides. See *State v. Brouillette*, 166 N.H. 487, 490 (2014) (“We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent.”). The dictionary definition of an “assessment” is “*an amount that a person is officially required to pay* especially as a tax.” See Merriam-Webster, Definition of “Assessment,” <https://www.merriam-webster.com/dictionary/assessment> (emphasis added). Like a tax or a fee, an OCC obligation is “an amount that a person is required to pay” under RSA 604-A:9 and is therefore an “assessment” under RSA 604-A:2-f.

This plain meaning is also consistent with the statutory scheme of Chapter 604-A. See *Brouillette*, 166 N.H. at 490 (“Our goal is to apply statutes in light of the policy sought to be advanced by the entire statutory scheme. Accordingly, we interpret a statute in the context of the overall statutory scheme and not in isolation.”) (quoting *State v. Addison*, 165 N.H. 381, 418 (2013)). Senate Bill 200 placed these protections directly in Chapter 604-A—in RSA 604-A:2-f in particular. Thus, the obligations that can be imposed under Chapter 604-A—here, OCC payment obligations under RSA 604-A:9—must be subject to the protections in RSA 604-A:2-f. Indeed, the legislature could have expressly exempted OCC payment obligations under RSA 604-A:9 from the protections provided in RSA 604-A:2-f if it so chose, but it did not do so. This is because doing so would have undermined the legislature’s scheme to apply these protections to all obligations that can be enforced under Chapter 604-A.

OCC fees are also assessments analogous to fines and restitution because, as a practical matter, there is little difference between how fines/restitution and OCC fees are imposed on defendants. At the earliest stage of the criminal case, the court appoints counsel and informs the defendant that he has the obligation to repay the State in an appropriate amount for those services. That OCC debt is a front-end obligation that the defendant carries after the outcome of the criminal case. The OCC debt obligation is essentially the same as the debt the defendant incurs when he or she is fined at the end of a case or is ordered to pay restitution or a penalty assessment. Both the OCC debt and the fine/restitution debt stay with the defendant long past the duration of the case. This OCC debt is also, as the State apparently argues, enforceable in criminal court like a fine or restitution obligation. The State effectively treats this OCC debt like a fine/restitution obligation, as it seeks to use the remedies available in the criminal court system—as the State would with fines and restitution—to enforce this debt, including through cash bail orders.

Defining an OCC debt as an “assessment” under RSA 604-A:2-f is also consistent with Senate Bill 200’s legislative history. *See Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673, 677 (2011) (explaining that, when there is more than one reasonable interpretation of a statutory provision, the statute is ambiguous, and a court then looks to legislative history to aid its analysis). The enactment of RSA 604-A:2-f in 2017 was caused, in part, by a report published by the ACLU-NH on September 23, 2015 that chronicled debtors’ prisons practices in New Hampshire. One of the examples in that report that led to the enactment of Senate Bill 200 concerned a Circuit Court judge ordering a person to be jailed, without a meaningful ability-to-pay hearing, if he could not pay his outstanding \$212 OCC debt by the end of the day. *See ACLU-NH Sept. 23, 2015 Debtors’ Prison Report*, at p. 18 (citing Dennis Suprenant case), App. Ex. A, at 21. In this case, the ACLU-NH filed with the New Hampshire Supreme Court an emergency petition appealing the Circuit Court’s order. *See State v. Suprenant Emergency Petition for Expedited Review*, App. Ex.

N, at 147-75. The New Hampshire Supreme Court stayed enforcement of the Circuit Court’s order. *See Petition of Dennis Suprenant*, No. 2014-0102 (N.H. Feb. 21, 2014), App. Ex. O, at 177. As a result, this OCC debtor was no longer required to immediately pay the \$212 or go to jail. The legislature enacted RSA 604-A:2-f, in part, to remedy what occurred in this case concerning an OCC debt obligation.

As some on this Court also know, there was much discussion before the New Hampshire Supreme Court Advisory Committee on Rules about whether the collection of past-due fines and fees was criminal or civil contempt. Some argued that it was civil contempt. Others, including the ACLU-NH and Professor Albert E. Scherr, argued that it was criminal contempt, which would trigger procedural due process protections.¹⁸ And yet others on the Committee argued that it was a hybrid process. When the Court rejected the proposed right-to-counsel rules changes concerning fee payment obligations, the Court characterized this process as “civil contempt.”¹⁹ However, the legislature believed through the enactment of Senate Bill 200 that some procedural due process protections afforded to defendants in the context of a criminal contempt proceeding—namely, the right to counsel—should apply in circumstances concerning fee repayment. Fittingly, the combination of the Court’s rule changes and the legislature’s enactment of Senate Bill 200 may have captured the hybrid nature of assessment collection through the criminal justice process. In

¹⁸ “An indirect criminal contempt cannot be punished without adherence to certain procedural formalities. Generally, the proceeding must satisfy the procedural requirements of a criminal proceeding. The alleged contemnor must first be provided notice, stating the time and place of hearing and the essential facts constituting the criminal contempt charged, and describing the charge as one for criminal contempt. The notice must also allow the defendant a reasonable time for the preparation of a defense.” *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 788 (2006) (citations omitted); *see also Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982) (“a significant liberty interest exists which is worthy of due process protection ... when some condition set by the court has not been met and incarceration is the proposed remedy”; noting that representation by counsel is part of that due process protection).

¹⁹ *See In re August 3, 2016 Report of the Advisory Committee on Rules*, No. R-2016-003, (N.H. Oct. 17, 2016), App. Ex. B, at 27 (“The court notes that New Hampshire law has long recognized the authority of courts to appoint a lawyer at state expense on a case-by-case basis for an indigent defendant facing incarceration for civil contempt where the circumstances of the particular case are sufficiently complex or where other special circumstances exist ...”), at 29 (adopting Criminal Procedure Rule 29(e)(4), which states that “[c]onduct which the court finds is a willful failure to pay an assessment or to perform community service as ordered may be punishable as civil contempt of court subject to the provisions of RSA 618:9.”).

any event, however one characterizes OCC payment obligations—whether it be civil contempt, criminal contempt, or a hybrid of the two—the legislature has made clear that the protections of RSA 604-A:2-f must apply. *See also State v. Dudley*, 766 N.W.2d 606, 618 (Iowa 2009) (“We conclude these statutory provisions evidence a legislative intent to extend a defendant's right to counsel to these postacquittal proceedings.”).

B. RSA 604-A:2-f Entitles Mr. Brawley to a Mandated Set of Procedures Before and at the Hearing, None of Which Occurred in this Case.

RSA 604-A:2-f mandates a set of procedures and practices by the court for those—including OCC debtors—who are at risk of incarceration for non-payment of an assessment.

Procedurally, the court must provide the defendant with a financial affidavit and direct the defendant to complete it. RSA 604-A:2-f, II(a). The court must inform him or her that he or she may be immediately jailed if the court finds that he or she has willfully failed to comply with the court's prior recoupment order. RSA 604-A:2-f, II(b). The court must also tell the defendant that he or she is entitled to counsel for the hearing outcome and, if the defendant cannot afford one, the court will appoint counsel. RSA 604-A:2-f, II(c). Finally, before the hearing, the court must tell the defendant what the issues are at the hearing and the process provided. RSA 604-A:2-f, II(d).

At the hearing, the defendant must have counsel or execute an appropriate waiver of counsel. RSA 604-A:2-f, I. Substantively, the court would be required to determine whether the defendant had the ability to pay the recoupment assessment. This judicial determination would be separate and distinct from any conclusion drawn by the OCC (an executive branch agency) as to the defendant's ability to pay. The court must make a specific inquiry of the defendant concerning his or her financial circumstances and his or her reasons for nonpayment. Only if the court finds that the defendant willfully failed to pay the recoupment assessment may the court consider jailing the defendant for non-payment. RSA 604-A:2-f, I.

OCC's assessment-collection practices do not follow RSA 604-A:2-f. Their notice for a show-cause hearing does not follow the statute's requirements. It does not inform the debtor of his or her right to counsel in the event the court holds a final hearing of nonpayment where incarceration is an available option. The OCC apparently does not provide the person with a financial affidavit or identify the issues to be litigated at the hearing, including that it is an ability-to-pay hearing at which the debtor has an opportunity to show through testimony and/or documentary evidence that that he or she does not have the ability to pay the assessment.

The record in this case reflects that the Superior Court did not follow these procedures. The Superior Court's failure is understandable for two reasons. First, the Superior Court's order was issued on June 15, 2017—before the August 1, 2017 enactment date of RSA 604-A:2-f. Second, the Superior Court viewed the end-game recoupment process where there was an acquittal as a civil collection matter outside the ambit of RSA 604-A. In any event, going forward, OCC payment procedures need to be conducted in accordance with RSA 604-A:2-f.

Accordingly, this case should be remanded for a RSA 604-A:2-f hearing that also comports with the constitutional protections explained in Sections II and III *infra*.

II. The Issuance of Cash Bail Orders in the Amount Owed to the OCC is Unconstitutional.

A. The Issuance of Cash Bail Orders in the Amount Owed to OCC Violates the Right to Equal Protection.

The issuance of cash bail orders in the amount owed to OCC violates the equal protection provisions in Part I, Articles 1 and 2 to the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution.²⁰ Such orders arbitrarily deprive indigent criminal

²⁰ See U.S. Const., amend. XIV, Section 1 (no state shall “deny to any person within its jurisdiction the equal protection of the laws”); N.H. Const., Pt. I, Arts. 1 and 2 (“All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.”; “All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness”).

debtor defendants who fail to pay the OCC the protections that are provided to civil judgment debtors.

The United States Supreme Court has held that recoupment statutes can violate equal protection when indigent criminal defendants are arbitrarily treated differently than other classes of civil debtors. *See James v. Strange*, 407 U.S. 128, 139 (1972) (“If acquitted, the indigent finds himself obligated to repay the State for a service the need for which resulted from the State’s prosecution. It is difficult to see why such a defendant, adjudged to be innocent of the State’s charge, should be denied basic exemptions accorded to all other judgment debtors.”). Furthermore, this Court has previously opined that a proposed indigent defense recoupment statute would violate equal protection if indigent criminal defendants are deprived of the protections afforded to other civil judgment debtors. *See Opinion of the Justices*, 121 N.H. 531, 538 (1981) (“This statute, as we read it, would deprive indigent criminal defendants of the protective exemptions that RSA 512:21 affords to other civil judgment debtors. The United States Supreme Court has held that such discriminatory treatment runs afoul of equal protection principles.”).²¹

These cash bail orders concerning OCC repayment differ from the remedies available in the context of civil judgment debt collection in three respects. First, the issuance of such orders does not take into consideration the debtor’s ability to pay, which is required for civil judgment debtors who are subject to New Hampshire’s periodic payment process under RSA 524:6-a. Under this cash bail scheme, if the person fails to appear, the court often simply issues the bail

²¹ Based on United States and New Hampshire Supreme Court precedent, five basic requirements must exist in any recoupment scheme: (1) the program must guarantee the fundamental right to counsel without cumbersome procedural obstacles; (2) the decision to impose repayment must not be made without providing the defendant notice of the contemplated action and a meaningful opportunity to be heard; (3) the entity deciding whether to require repayment must consider the defendant’s resources, other demands on his or her own and family finances, and the hardships that will be endured if repayment is required; (4) the defendant cannot be exposed to more severe collection practices than the ordinary civil debtor; and (5) the indigent defendant ordered to repay as a condition of work-release, parole, or probation cannot be imprisoned for defaulting as long as the default is attributable to poverty. *See Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984). In this area, the court’s discretion must be guided by “rehabilitative considerations, not by a desire to punish or to collect a debt owed to the state.” *Id.* at 125.

order at OCC's request. The person can then be detained, potentially until the full debt is paid. There is no examination into the debtor's ability to pay before he or she is ordered to pay the full amount as a condition of release. However, under RSA 524:6-a which applies to civil judgment debtors, a court cannot issue a civil contempt order until an ability-to-pay hearing has been conducted where the court must determine if "the failure [to pay] was the result of a change in circumstances, or the failure was not intentional or in bad faith, or for other good cause." See RSA 524:6-a; see also *Sheedy v. Merrimack Cty. Superior Court*, 128 N.H. 51, 55 (1986) (describing process under RSA 524:6-a).

Indeed, such an ability-to-pay assessment is constitutionally required, yet is not conducted when a cash bail order is issued in the context of OCC payment obligations. See *Opinion of the Justices*, 121 N.H. 531, 539 (1981) (proposed version of RSA 604-A:9, I would be unconstitutional because it "would impose on all indigent defendants an absolute obligation to reimburse the State, regardless of a defendant's particular circumstances or his foreseeable ability to meet that obligation"); see also *Bearden v. Georgia*, 461 U.S. 660 (1983) (the government can only imprison or jail someone for not paying a fine if it can be shown, by means of a hearing, that the person in question could have paid it but "willfully" chose not to do so); *Fuller v. Oregon*, 417 U.S. 40, 46 (1974) (Oregon counsel fees repayment statute was constitutional, in part, because it was tailored to impose such obligation only upon those with a foreseeable ability to meet it, and to enforce such obligation only against those who actually become able to meet it without hardship); *State v. Fowlie*, 138 N.H. 234, 237 (1994) (following *Bearden* in the context of restitution). RSA 604-A:9 also requires an assessment of "present or future ability to pay." See RSA 604-A:9, I.

Second, and relatedly, cash bail orders concerning OCC payment obligations fail to comply with the protections afforded to periodic payment debtors under RSA 524:6-a as memorialized under *Mason Furniture Corp. v. George*, 116 N.H. 451 (1976). Setting aside the

fact that RSA 524:6-a does not explicitly give a court, upon a failure to appear, the power to hold a person on cash bail until the person pays the full debt obligation, this Court has stated the following: “The court may, but need not, require payment of the full amount which is overdue as the condition of release. In determining whether coercive commitment is an appropriate remedy, the court should first consider the defendant’s explanation of his failure to make the overdue payment. The court should then consider whether other methods of executing the judgment have been tried, whether alternative methods are presently available, whether the defendant has simply failed to pay or has taken active measures to frustrate collection. The court should consider all relevant circumstances and make such order as justice requires.” *See Mason Furniture Corp.*, 116 N.H. at 453. With respect to the cash bail orders set in the amount owed to OCC, this inquiry under *Mason Furniture Corp.* that is designed to protect debtors is not being followed.

Third and finally, these cash bail orders fail to give OCC debtors the benefit of exemptions that are afforded to civil judgment debtors. When and if the OCC debtor is detained under this cash bail order, the person can potentially only be released until the person pays the court the full debt obligation. This money will then be remitted to the OCC regardless of whether the funds used would have been exempt if this was a standard civil judgment debt.²² With respect to this OCC debt, failure to accommodate the exemptions listed under RSA 512:21 violates New Hampshire statutory and constitutional law. *See* RSA 604-A:9, III (stating that “no money, rights,

²² These exemptions include the following: RSA 524:6-a, II (exempting “[a]ny income from a retirement plan or arrangement qualified for tax exemption purposes ... shall be exempt from periodic payments up to the amount of 50 times the minimum hourly wage as established by the Fair Labor Standards Act, per week”); *Sheedy*, 128 N.H. at 55 (noting that the purpose of RSA 524:6-a is not “to deny a debtor the property and income needed to sustain life or the ability to earn income in the future, but rather to determine whether a debtor as property or income not needed for the necessities or life from which a judgment may be paid”); RSA 512:21 (listing multiple exemptions); RSA 511:2 (exempting certain property from attachment and execution); RSA 480:1 (exempting a debtor’s homestead interest in the amount of \$120,000); RSA 282-A:159 (exempting unemployment compensation benefits, provided they are not mingled with other funds, unless debts are for necessities furnished while the debtor was unemployed or for child support); RSA 281-A:52 (exempting workers compensation benefits, except for certain medical bills related to the injury and certain attorneys fees), RSA 167:25 (exempting state welfare benefits); RSA 167:25 (exempting public assistance to the blind, aged, or disabled persons).

or credits listed in RSA 512:21 shall be subject to deduction”); *Opinion of the Justices*, 121 N.H. 531, 538 (1981) (holding that OCC debtors cannot be deprived “of the protective exemptions that RSA 512:21 affords to other civil judgment debtors”). If the cash bail order is enforced, the person must also post this amount and pay OCC regardless of whether the person’s only income is from social security benefits, which would be exempt from collection if this were a civil judgment debt. See RSA 282-A:159 (exempting Social Security benefits); see also *Todd v. Romano*, 131 N.H. 96, 97 (1988) (holding that the protection given social security recipients under 42 U.S.C. § 407(a) unambiguously ruled out any attempt to attach Social Security benefits); N.H. Superior Court Rule 51(g) (under rule governing periodic payments, “[i]f the court is satisfied that the debtor has property not exempt from attachment or execution, the court may order the debtor to produce it, or so much thereof as may be sufficient, to satisfy the judgment and cost of the proceedings, so that it may be taken on execution”) (emphasis added); N.H. Circuit Court Rule 1.21(5) (same). Unlike OCC debtors, civil judgment debtors are not treated in this fashion and are given the benefit of these statutory exemptions. And, unlike the OCC when it seeks to collect, a civil judgment creditor must file a new civil case and pay a filing fee when it seeks to collect.

Any order by a criminal court judge setting cash bail at the amount owed to OCC effectively creates two separate classes of similarly-situated debtors in New Hampshire: (i) those who retain private counsel because they are not indigent and, if they fail to pay this private counsel, will only be subjected to the civil judgment procedures of RSA 524:6-a and Superior Court Rule 51/Circuit Court Rule 1.21, and (ii) those who cannot afford to retain private counsel because they are indigent and therefore will potentially be subjected to these inadequate protections outside the civil judgment collection process if they fail to pay. See *Opinion of the Justices (Limitation on Civil Actions)*, 137 N.H. 260, 265-66, (1993) (“The first question in an equal protection analysis is whether the State action in question treats similarly situated persons

differently.”) (quoting *Appeal of Marmac*, 130 N.H. 53, 58 (1987)). Put another way, indigent individuals like Mr. Brawley who received court-appointed defense representation but failed to pay and appear are subjected to potentially criminal sanctions in the form of a cash bail order set at the amount owed (without an ability-to-pay assessment), while non-indigent individuals who were able to afford private counsel (but failed to pay private counsel) would escape like treatment under the civil judgment debt collection process.

No permissible justification for the issuance of these cash bail orders exists here other than the desire to make the collections efforts of a government entity easier. Such a justification is insufficient. *See James*, 407 U.S. at 138 (“a State may [not] impose ... discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor”). Indeed, the New Hampshire Superior Court addressed a similar issue in 2001 concerning the propriety of the Superior Court’s standard sentencing form which stated as one of its conditions that “[t]he defendant shall reimburse the State for counsel fees in a manner determined by the Office of Cost Containment.” *See State v. Maniscalco*, Nos. 98-S-482-485, 98-S-591-594, 2001 N.H. Super. LEXIS 5, at *1 (N.H. Super. Ct., Rockingham Cty., May 14, 2001) (Coffey, presiding justice), App. Ex. F, at 46-47. As a result of this form’s language, a person could effectively have his or her sentence for a crime reimposed if he or she failed to pay OCC fees. The Superior Court held that “[t]he current sentencing forms do treat similarly situated persons differently and, therefore, could present a viable equal protection claim if actual harm were to result.” *Id.* at *4. The Superior Court explained: “As matters now stand, the court could impose [the defendant’s] suspended sentences simply because he failed to pay counsel. Thus, the punishment of [the defendant] for his failure to pay would be one and the same with his punishment for forgery. Another defendant, who was able to afford private counsel but failed to pay, would escape like punishment. The court could only enforce payment of a debt to private counsel with civil

contempt, not with criminal sanctions.” *Id.* As a result, the Superior Court concluded that the “standard sentencing forms create a potential for harm unique to indigent defendants.” *Id.* at *5. The Court then, as a matter of administrative discretion, removed this language. *Id.*

Other courts have reached the same result. *See, e.g., State v. Dudley*, 766 N.W.2d 606, 616-17 (Iowa 2009) (holding that the court’s authority under the challenged recoupment statute to order payment in reasonable installments was unrestricted and therefore allowed circumvention of the protections provided by our statutes governing execution on a civil judgment, which violated equal protection under *James*), *superseded by statute as referenced in Jacobs v. State*, 860 N.W.2d 341 (Iowa Ct. App. 2014); *see also Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984) (holding for recoupment statute to pass constitutional muster, it must not expose defendant accepting court-appointed counsel “to more severe collection practices than the ordinary civil debtor”).

Accordingly, under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment, the courts cannot enter cash bail orders in the amount of the obligation owed and remit any collected bail amounts to the OCC.

B. The Issuance of Cash Bail Order in the Amount Owed to OCC Violates the Right to be Free from Excessive Bail.

The New Hampshire Constitution states that no court of law “shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.” N.H. Const. pt. I, art. 33. With respect to determining a constitutionally appropriate bail amount, the New Hampshire Supreme Court, in keeping with United States Supreme Court holdings regarding the Eighth Amendment, has asserted that “[t]he purpose of the imposition of bail is to assure the defendant’s appearance in court, and therefore the amount of bail may be set no higher than that figure reasonably required to accomplish this result.” *Opinion of the Justices*, 117 N.H. 382, 384 (1977);

Stack v. Boyle, 342 U.S. 1, 4 (1951) (the function of bail is limited to the purpose of assuring the presence of defendant); *see also State v. Enderson*, 148 N.H. 252, 258 (2002) (New Hampshire Constitution provides as much protection as the Eighth Amendment of the federal constitution).

This Court has previously evaluated the constitutionality of proposed legislation that would impose an assessment fee on criminal defendants based on and in addition to bail. The Court determined that such a provision would violate both Part I, Article 33 of the New Hampshire Constitution and similar provisions of the federal constitution because it would impose a fee, owed to the government, that went beyond what would be necessary to secure the defendant's presence in court. *Opinion of the Justices*, 117 N.H. at 384. In evaluating the proposed New Hampshire scheme, the Court referred to the reasoning used in a similar case before the California Supreme Court also evaluating a legislative act containing a provision that attached a fee to bail. In its evaluation of the proposed state scheme, the California Supreme Court stated that "there should be no suggestion of revenue to the government or punishment of the defendant" in a bail determination. *McDermott v. Superior Court*, 6 Cal. 3d 693, 695 (1972).

Similarly, the First Circuit and other federal courts of appeal have emphasized that bail should not be set with the object of enriching the government or punishing the defendant. *Campbell v. Johnson*, 586 F.3d 835, 843 (11th Cir. 2009) (citing *United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986)). The governing criterion for excessiveness of bail is "not whether the defendant is capable of posting bond, but whether the amount set is reasonably calculated to assure the defendant's appearance." *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987); *United States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980) (same); *United States v. Wright*, 483 F.2d 1068, 1069 (4th Cir. 1973) (same). "Even an accused who posts the required bond does not forfeit the right to complain about how or why it was set." *Wagenmann*, 829 F.2d at 213 (citation omitted).

“The lack of logic in a contention that simply because bail has been set in an amount within reach of a criminal defendant it is *ipso facto* not unreasonable is, or should be, ... apparent....” *Id.*

In the “Motion to Show Cause” form the OCC used in this case (and uses in cases throughout New Hampshire), the requested bail bears no relationship to an amount required to secure the debtor’s appearance. Rather, these requests constitute an attempt to secure the entire amount of funds that OCC alleges debtors should pay as recoupment for defense costs related to court-appointed defense representation. The OCC is attempting to use the criminal court’s bail setting power as a way of bypassing the legislatively created mechanism for proper assessment of the recoupment fees. This Court, other state courts, and federal courts have all consistently held that bail cannot be used as a mechanism to raise revenue for the government. Thus, this Court should follow its own previous reasoning and that of other state a federal courts and decline to grant this wholly improper request for bail as it would violate both state and federal law. Indeed, the Superior Court in this case correctly expressed serious concerns with the OCC’s practices, noting that the bail amount sought by the OCC “has no relationship to the amount of bail necessary to ensure the defendant’s appearance.” *See* Trial Ct. Order, at p. 4.

Furthermore, in the limited circumstances where courts have held that including an administrative fee in a bail amount was not in violation of the Eighth Amendment’s prohibition on excessive bail, the amount requested was explicitly considered nominal (under \$15) and there was no showing that individuals had actually been held in jail simply because they were unable to pay the administrative fee. *See, e.g., Broussard v. Parish of Orleans*, 318 F.3d 644, 647–48, 651 (5th Cir.2003); *see also Payton v. County of Carroll*, 473 F.3d 845, 846–50 (7th Cir.2007) (relying on *Broussard* to reject an Eighth Amendment excessive bail challenge to a \$1 administrative fee for posting bond). In contrast, OCC’s request for bail in this case and others are neither nominal nor theoretical in their restrictiveness. In Mr. Brawley’s case, \$403.75 is well in excess of what courts

have found to be a “nominal” fee. Nothing in RSA 604-A:9 authorizes the OCC to engage in thinly veiled attempts at recouping fees for court-appointed defense counsel through requests for bail. This Court should not allow the OCC to bypass the legislatively sanctioned process with unreasonable and unsanctioned bail requests.

III. The Notice Provisions of RSA 604-A:9, I-c Violate the Right to Equal Protection.

As a matter of statutory interpretation, the notice provisions set forth in RSA 604-A:9, I-c concerning the enforcement of OCC payment orders apply to all debtors, even if the debtor is acquitted. However, the notice of provisions of RSA 604-A:9, I-c violate the equal protection provisions in Part I, Articles 1 and 2 to the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution. Such orders arbitrarily deprive indigent criminal debtor defendants who fail to pay OCC the strict notice protections that are provided to civil judgment debtors in New Hampshire. *See James v. Strange*, 407 U.S. 128, 139 (1972); *see also Opinion of the Justices*, 121 N.H. 531, 538 (1981).

The State contends that RSA 604-A:9, I-c authorizes the OCC to simply mail notice to the debtor’s last known address on file, as it did in Mr. Brawley’s case. Under RSA 604-A:9, I-c, “the defendant shall be required to notify the clerk of court and the office of cost containment of each change of mail address and actual street address” and “notice to the last mail address on file shall be deemed notice to and binding on the defendant.” *See* RSA 604-A:9, I-c. As in this case, the OCC will seek cash bail orders for a failure to appear without verifying that the person currently lives and received mail at the address that the notice was sent to. RSA 604-A:9, I-c requires no such verification. And when the notice sent is marked “return to sender” by the postal service, the

OCC will often continue to seek a cash bail order if the debtor fails to appear even though the OCC knows that the debtor was actually never informed of the hearing given the returned notice.²³

Notice is much stricter under New Hampshire’s civil judgment collection process. For example, with respect to periodic payment judgments, “[t]he judgment creditor shall cause the Notice of Hearing to be served either in-hand [by the Sheriff’s Department] or by certified mail, restricted delivery, return receipt requested. If the judgment creditor elects to serve the Notice of Hearing by certified mail, restricted delivery, return receipt requested, and if the return receipt is returned without indication that the Notice of Hearing has been properly served, then in-hand service [by the Sheriff’s Department] shall be required.” N.H. Superior Court Rule 51(c); *see also* N.H. Circuit Court Rule 1.21(2).²⁴ The New Hampshire Superior Court has created a helpful document explaining the collection process for civil judgments. *See* N.H. Superior Court, “How Do I Collect on a Civil Judgment,” App. Ex. P, at 179-189. Traditional civil cases have similar robust service/notice rules where simply mailing legal documents to a last known address is insufficient for both New Hampshire and non-New Hampshire resident defendants.²⁵ The purpose

²³ *See, e.g., State v. Cosme*, Case Summary, at Index #20 (show cause hearing held and bench warrant issued on March 27, 2017 after mail returned on March 13, 2017), App. Ex. H, at 64; *State v. Chenette*, Case Summary, at Index #11 (hearing held and bench warrant issued on February 22, 2017 after mail returned on February 21, 2017), App. Ex. I, at 76.

²⁴ As the Superior Court correctly explained in this case “[g]enerally, civil judgments may be enforced by writs of execution, motions for periodic payments and motions for contempt of periodic payment orders. When a judgment creditor requests a periodic payment hearing the creditor must serve the judgment creditor in hand or by certified mail. When a judgment creditor requests a contempt hearing to enforce a payment order, the court will require the judgment creditor to serve the judgment debtor in the same manner unless there have been recent proceedings in which the judgment debtor appeared.” *See* Trial Ct. Order, at pp. 2-3.

²⁵ *See Nault v. Tirado*, 155 N.H. 449, 451 (2007) (“Service on a New Hampshire resident is accomplished by either giving a copy of the writ to the defendant within the state, or by ‘leaving [it] at his abode.’”; further holding that an “abode” is “the place where the process is left is the place where the defendant has been living and to which he or she may be expected to return in sufficient time to become apprised of . . . the action and to prepare a response”); RSA 510:2 (service can be effectuated by leaving the writs and other processes at the defendant’s “abode” if it is in New Hampshire); RSA 510:4, II (discussing service rules for defendants who are not residents of New Hampshire); *Impact Food Sales, Inc. v. Evans*, 160 N.H. 386, 394 (2010) (“RSA 510:4 does not authorize service on an out-of-state defendant by providing notice by first class mail.”); *see also* N.H. Super. Ct. R. 4(c) (governing civil cases, stating that “Upon receipt of the Complaint and, if the filing fee is not waived, the filing fee, the court will process the action and provide plaintiff with the completed Summons for service. The Summons will identify: (i) the date the Complaint is filed; (ii) the court-ordered deadline for service; and (iii) a hearing date, if appropriate. Plaintiff will cause the Summons together with a copy of the Complaint to be served on defendant no later than the court-ordered deadline for

of these service rules, of course, is to ensure that a debtor/litigant is properly notified and will have a full and adequate opportunity to defend himself or herself. *See Nault v. Tirado*, 155 N.H. 449, 451 (2007) (“Strict compliance with the statutory requirements for service of process is required to provide the defendant with constitutionally sufficient notice of the action, and to vest the trial court with jurisdiction over the defendant.”) (emphasis added).

The OCC’s desire to engage in a far less robust notice process outside of what is required in civil cases is particularly troubling where, if the person does not show up for the hearing listed on the mailing, the OCC will then attempt to have the person arrested and jailed until the full OCC obligation is met. It should be of little surprise that—given the OCC’s deficient notice practices under RSA 604-A:9, I-c and failure to verify debtors’ addresses—some OCC debtors fail to appear in court. Many indigent debtors—who are often more transient, less sophisticated, and have little knowledge of the law—may not be fully aware that they have to notify the courts and OCC of address changes, especially after the criminal case has been resolved. (One acquitted would be particularly prone to a failure to appear, given the lack of explicit warning at the front end of the appointment process that the obligation to pay recoupment applies even after an acquittal.) This is because the forms disclosing this obligation are completed at the beginning of the criminal case often months or years before the case resolves and before the OCC meaningfully commences enforcement of the debt obligation. These indigent individuals then move without reporting their new address, fail to receive notice of court dates because it was sent to their prior address, and therefore then miss court dates concerning OCC debt collection. The result is a perfect storm where the OCC then seeks to detain these individuals, possibly indefinitely, if they

service, service to be made as specified in RSA 510, or as otherwise allowed by law. Proof of service shall be filed with the court within 21 days or the court-ordered deadline for service. If a defendant is not served within the court-ordered deadline for service, the court shall dismiss the action with or without prejudice, as justice may require.”).

fail to appear. *See, e.g., State v. Cosme*, Mar. 30, 2017 Mot. to Vacate Default (Cosme noting that “I didn’t get any of my mail, I wasn’t aware I had court ...”), App. Ex. H, at 72.

As with the use of cash bail orders in the amount owed, *see supra* Section II.A, there is no reasonable rationale for treating OCC debtors—who have simply invoked their right to counsel and are indigent—differently from civil judgment debtors. The only plausible explanation for this differential treatment is a desire on the part of the government to be given preferential treatment in the collection of debts. However, once again, the United States Supreme Court has rejected this justification. *See James*, 407 U.S. at 138.

CONCLUSION

For the aforementioned reasons, the decision of the Rockingham Superior Court should be remanded for further proceedings consistent with the principles in Sections I-III of this brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Amicus Curiae American Civil Liberties Union of New Hampshire, Professor Albert E. Scherr, and New Hampshire Legal Assistance in Support of John T. Brawley* was served this 19th day of April, 2018 by first class mail, postage prepaid, and by electronic mail on counsel for the State/Appellee (John J. Conforti, Esq.).



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